Kurdziel Iron of Wauseon, Inc. ***and*** **International Union, United Automobile, Aerospace, Agricultural Implement Workers of America, UAW.** Case 8–CA–28930

November 30, 1998

DECISION AND ORDER

BY MEMBERS FOX, LIEBMAN, AND HURTGEN

On December 12, 1997, Administrative Law Judge Margaret M. Kern issued the attached decision. The General Counsel filed exceptions, a supporting brief, and an answering brief to the Respondent's cross-exceptions. The Respondent filed cross-exceptions, a supporting brief, and an answering brief to the General Counsel's exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm judge's rulings, findings,[1] and conclusions as modified below and to adopt the recommended Order as modified.[2]

1. The judge dismissed the complaint allegation that the Respondent violated Section 8(a)(5) and (1) by failing to give bargaining unit employees a wage increase in 1996. The judge found that the evidence was insufficient to show that the Respondent had a pattern or practice of granting cost-of-living increases on an annual basis. The judge also rejected the General Counsel's alternative theory that the Respondent had an established practice of giving the same wage increase to employees at the Wauseon facility that it gave to employees at another plant (the Britt plant) and that it had unlawfully unilaterally discontinued that practice. We disagree.

As the judge found, during the first week of October 1994 and 1995, the Respondent granted increases of 3.75 percent and 2.75 percent, respectively, to employees at both its Wauseon and Britt facilities. In October 1996, after the Union was certified to represent employees at the Wauseon facility, the Respondent granted a 3-percent increase to employees at the Britt facility, but did not give any increase to employees at the Wauseon facility. The Britt facility has been in operation since 1991 or 1992. The Respondent commenced operations at the Wauseon facility in March 1993. The facilities are located in the same town and share a plant manager. Contrary to the judge, we find that the General Counsel has introduced sufficient evidence to show that the Respondent had an established practice of granting increases at the Wauseon facility that were pegged to increases given at the Britt facility. In our view, the fact that the 1995 and 1996 increases were identical at the Britt and Wauseon facilities warrants an inference that the Respondent applied common criteria to determine the increase to be given at those facilities, and that if it had continued that practice, it would have again granted identical increases at the Britt and Wauseon facilities in 1996.[3] Plant Superintendent Gary Schwert's response to a question by employee Thomas Bishard just before the decertification election in April 1997, indicating that, if the employees voted the Union out, they would get a 3-percent increase[4] provides further support for that conclusion. Accordingly, we find that the Respondent violated Section 8(a)(5) and (1) by failing to bargain to agreement or impasse with the Union before discontinuing its practice of granting an October wage increase to bargaining unit employees.

On the basis of Schwert's statement that the increase that had been withheld would be granted if the employees voted the Union out, we also find that the withholding of the increase violated Section 8(a)(3) and (1) as alleged in the complaint.

2. We agree with the judge that the Respondent's threat of a unilateral reduction in lunch and break times violated Section 8(a)(5) and (1) of the Act. As the judge found, three employees were summoned into the office of Plant Superintendent Schwert, who told them lunch breaks were limited to 20 minutes and morning breaks limited to 10 minutes; and when employee Arroyo took issue with this, Schwert displayed a copy of a memo stating: "Just a 'Reminder Memo' your lunch breaks are 20 minutes." Schwert told them that the Respondent had posted the memo. Even if the announced reduction did not finally result in the actual curtailment of employees' breaks, the damage to the bargaining relationship was accomplished. This occurred "simply by the message to the employees that the Respondent was taking it on itself" to set an important term and condition of employment, thereby suggesting the irrelevance of the employees' collective-bargaining representative. *ABC Automo-*

[1] In the absence of exceptions, we adopt the judge's dismissals of the complaint allegations that the Respondent violated Sec. 8(a)(1) and (5) through the conduct of Bob Robertson with respect posting a notice to employees regarding reduction of their lunch and break periods.

[2] Consistent with *Excel Container, Inc*., 325 NLRB 17 (1997), we have also revised the triggering date of the Respondent's notice-mailing obligation to the date of the first unfair labor practice.

[3] Member Hurtgen, in his partial dissent, notes the absence of evidence regarding wage increases at the two plants in the years prior to 1995. In the absence of evidence that the two plants were treated differently prior to 1994, we are unwilling to disregard the common practice for the two plants in 1994 and 1995 in assessing the pattern that should have been adhered to in October 1996.

[4] Schwert testified that he told Bishard that it was his "opinion" that if there were no Union, employees would get the increases. In our view it is immaterial whether Schwert preceded his response by stating that it was his opinion. Schwert was the plant superintendent, a member of the management negotiating team. Thus, his "opinion" as to what would occur could reasonably be regarded as tantamount to a statement of what would in fact occur.

This statement was not alleged or litigated by the General Counsel as a promise of benefit to induce decertification, in violation of Sec. 8(a)(1). Instead it was alleged only as a form of direct dealing. For reasons stated below, we adopt the judge's dismissal of that allegation.

tive Products Corp., 307 NLRB 248, 250 (1992), and cases there cited. From the employees' perspective in that encounter with Schwert, the threatened limit on break times was as much "in place" as the threatened change in health and welfare coverage for the strikers in *ABC Automotive*, who might later return to their jobs. Finally, we note that the amount of time a worker is allowed for lunch is one of those daily conditions of employment that the collective-bargaining representative is counted on to protect. "[T]he availability of food during working hours *and the conditions under which it is to be consumed* are matters of deep concern to workers, and one need not strain to consider them to be among those 'conditions' of employment that should be subject to the mutual duty to bargain" (emphasis added). *Ford Motor Co. v. NLRB*, 441 U.S. 488, 498 (1979). Since the present case involves working hours—at the core of subjects to which the statutory bargaining obligation applies—as well as to workday lunches, the Court's observation has special force here. Schwert's brandishing of the memo he claimed had been posted essentially told the employees that their representative had no voice in this matter.

3. We agree that the judge did not err in dismissing the allegation that the Respondent engaged in direct dealing with a unit employee over wages, in violation of Section 8(a)(5) and (1).

We rely on the reasons set forth by the judge, and we note particularly that the conversation between Thomas Bishard, who was a member of the Union's negotiating committee, and Plant Manager Gary Schwert was initiated by Bishard. Further, according to Bishard's testimony, it was Bishard who phrased the question as to whether the employees would receive a raise and better benefits "if the Union were voted out," and when Schwert started his answer by stating, "in my opinion," Bishard interrupted him, said he did not want Schwert's opinion, and demanded an answer. We agree with the judge that Bishard initiated the conversation with Schwert, not as an individual employee, but rather in his role as a member of the Union's negotiating committee, and that Schwert's answer in no way constituted an attempt to bypass the Union's bargaining authority.[5]

AMENDED CONCLUSION OF LAW

Insert the following as Conclusion of Law 6.

"6. Respondent violated Section 8(a)(5),(3) and (1) of the Act by unilaterally withholding an annual wage increase from bargaining unit employees in 1996."

AMENDED REMEDY

Substitute the following for the third paragraph.

"Affirmatively, the Respondent must rescind, in writing, any and all memoranda, including but not limited to the April 22, 1997 interoffice memo, which states, in substance, that employees' lunch period is less than 30 minutes or that employees' morning break period is less than 15 minutes. A copy of the decision, signed by an authorized representative of Respondent, shall be mailed to the Union. Respondent must make whole all eligible bargaining unit employees by paying them the October 1996 3-percent annual wage increase and for all lost earnings at the higher rate and other benefits suffered as a result of the discrimination against them. Backpay shall be computed as described in *F. W. Woolworth Co.,* 90 NLRB 289 (1950), with interest as described in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). The Respondent must also meet and bargain, on request, with the Union in a timely manner without regard to the participation or presence of a mediator at any bargaining session."

ORDER

The National Labor Relations Board orders that the Respondent, Kurdziel Iron of Wauseon, Inc., Wauseon, Ohio, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening to unilaterally reduce employees' lunch and morning break periods without first notifying the Union and giving the Union an opportunity to bargain about such changes.

(b) Unilaterally withholding from and failing to give bargaining unit employees an October 1996 annual wage increase of 3 percent.

(c) Insisting on the presence of a mediator as a precondition to meeting and bargaining with the Union.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Rescind, in writing, any and all memoranda, including but not limited to the April 22, 1997 interoffice memo, which states, in substance, that employees' lunch period is less than 30 minutes or that employees' morning break period is less than 15 minutes. A copy of the rescission, signed by an authorized representative of the Respondent, shall be mailed to the Union within 14 days from the date of this Order.

(b) Make all eligible bargaining unit employees whole by paying them the October 1996 3-percent annual wage increase and for any loss of earnings at the higher rate and other benefits suffered as a result of the discrimination against them plus interest, in the manner set forth in the amended remedy section of this decision.

(c) Meet and bargain, upon request, with the Union regarding terms and conditions of employment of the employees in the following appropriate unit in a timely manner and without regard to the participation or presence of a mediator at any bargaining session:

[5] As noted above, this statement was alleged only as an 8(a)(5) and (1) direct dealing violation.

> All full-time and regular part-time production and maintenance employees employed by the Respondent at its 620 W. Leggett, Wauseon, Ohio facility, but excluding all managerial employees, technical employees, truck drivers, office clerical employees, and professional employees, guards and supervisors as defined in the Act.

(d) Preserve and, within 14 days of request, make available to the Board or its agents for examination and copying, all records necessary to determine that the terms of this Order have been complied with.

(e) Within 14 days after service by the Region, post at its Wauseon facility in Wauseon, Ohio, copies of the attached notice marked "Appendix."[6] Copies of the notice, on forms provided by the Regional Director for Region 8, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since October 1966.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

MEMBER HURTGEN, dissenting in part.

I agree, for the reasons stated by my colleagues, that the judge appropriately dismissed the allegations that the Respondent engaged in direct dealing with unit employees.

I would not find that Respondent violated Section 8(a)(5) by announcing to three employees a reduction in lunch and break times. The General Counsel did not allege, and the judge did not find, that this conduct was an independent violation of Section 8(a)(1). Instead, the allegation was that Respondent "threatened" a unilateral change, in violation of Section 8(a)(5). However, there was no showing that Respondent intended to accomplish the change without bargaining. Indeed, one of the three employees was a member of the Union's negotiating committee. Further, and most importantly, no change (unilateral or otherwise) ever occurred. In these circumstances, I see no basis for finding an 8(a)(5) violation.

ABC Automotive, 307 NLRB 248 (1992), is distinguishable. In that case, "the unilateral change was effectively implemented when it was announced". Id at 250. That is, the new condition was instantly in place, and it would apply to strikers as and when they returned. By contrast, in the instant case, the change was *never* implemented. Further, unlike my colleagues, I would not conclude that the Respondent's announcement of a 10-minute reduction in the lunch period and a 5-minute reduction in the morning break period necessarily conveyed the message that the Union's role as bargaining representative was irrelevant. I do not quarrel with the proposition that lunch and break times are mandatory subjects of bargaining. I simply conclude that the mere communication here was not a refusal to bargain.

In addition, like the judge and contrary to my colleagues, I find that the General Counsel failed to establish that the Respondent's failure to grant a pay raise to the Wauseon employees in October 1996, violated Section 8(a)(5). In essence, the General Counsel demonstrated only that Wauseon employees got raises in October 1994 and 1995, and that those two raises were of the same amount as those given for the same years to employees at the Respondent's Britt plant. The Wauseon facility was opened in July 993 and the Britt plant has operated since 1991 or 1992. However, the General Counsel failed to show whether October raises were given at either facility prior to 1994. In sum, the evidence shows wage increases at Britt for 3 of its 5–6 years, and wage increases at Wauseon for 2 of its 4 years. In my view, this sparse evidence falls far short of establishing that the Respondent had an established "October" practice of giving Wauseon employees the same raise that was given to Britt employees. As the judge correctly concluded, under the criteria set forth in *Dynatron/Bondo Corp.*, 323 NLRB 1263 (1997), the General Counsel failed to establish that Respondent had any established pattern or practice of granting wage increases. In addition, as the judge noted, the General Counsel failed to show the criteria for the Respondent's 1994 and 1995 raises. These two raises were not of the same amount.

My colleagues also rely on an alleged statement, in April 1997, to show a past practice as of October 1996. Apart from the chronological distortion, the statement does not establish a past practice. Plant Superintendent Schwert allegedly said that Wauseon employees would get a raise if the Union was decertified. Schwert testified that he prefaced his remark by saying that it was only his opinion. Even the General Counsel's complaint does not allege that this expression of opinion was violative of Section 8(a)(1). In addition, Schwert did not say that the

[6] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.

raise would come in *October* 1997, and he did not say anything at all about Britt. Thus, the Schwert statement does not show a link between Britt and Wauseon or an "October" pattern.

Finally, and in view of all of the above, the alleged statement of April 1997 does not establish discrimination in October 1996.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT threaten to unilaterally reduce employees' lunch period and morning break period without first notifying the Union and giving the Union an opportunity to bargain about such changes.

WE WILL NOT unilaterally withhold and fail to give to bargaining unit employees the 1996 annual October wage increase.

WE WILL NOT insist on the presence of a mediator as a precondition to meeting and bargaining with the Union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL rescind any and all memoranda, including but not limited to the April 22, 1997 interoffice memo, which states, in substance, that employees' lunch period is less than 30 minutes or that employees' morning break period is less than 15 minutes.

WE WILL make whole all eligible bargaining unit employees by paying to them the October 1996 annual wage increase of 3 percent and for any loss of earnings at the higher rate and other benefits suffered as a result of the discrimination against them plus interest.

WE WILL meet and bargain, on request, with the Union regarding terms and conditions of employment of the employees in the following appropriate unit in a timely manner and without regard to the participation or presence of a mediator at any bargaining session:

All full-time and regular part-time production and maintenance employees employed by us at our 620 W. Leggett, Wauseon, Ohio facility, but excluding all managerial employees, technical employees, truck drivers, office clerical employees, and professional employees, guards and supervisors as defined in the Act.

KURDZIEL IRON OF WAUSEON, INC.

Rufus L. Warr, Esq., for the General Counsel.
Robert W. Sikkel, Esq. and *Robert Dubault, Esq.,* for the Respondent.

DECISION

STATEMENT OF THE CASE

MARGARET M. KERN, Administrative Law Judge. This case was tried before me in Toledo, Ohio, on October 6, 1997.[1] The complaint, which issued on July 29, was based on unfair labor practice charges filed on April 3 and 8 and May 13 by the International Union, United Automobile, Aerospace, Agricultural Implement Workers of America, UAW (the Union) against Kurdziel Iron of Wauseon, Inc. (the Respondent).

The complaint alleges and Respondent admits that on March 19, 1996, the Union was certified as the exclusive collective-bargaining representative of the production and maintenance employees employed by Respondent at its Wauseon, Ohio facility (the Wauseon facility). Respondent further admits that on June 11, following a recertification election, the Union was again certified, and that at all times since March 19, 1996, the Union has been the exclusive collective-bargaining representative of the employees in the unit.

The complaint alleges and Respondent denies that in October 1996, Respondent failed to give bargaining unit employees a customary cost-of-living wage increase of 3 percent in violation of Section 8(a)(1), (3), and (5) of the Act. It is further alleged and denied that on or about April 10, Respondent bypassed the Union and dealt directly with employees, that on April 18 or 19 Respondent posted a notice which unilaterally reduced the lunch and break periods, and that from March 24 to July 22, Respondent failed and refused to meet and bargain with the Union, all in violation of Section 8(a)(1) and (5) of the Act.

For the reasons set forth here, I find that Respondent unlawfully threatened to unilaterally reduce the lunch and break periods, and failed to meet and bargain collectively with the Union from the period March 24 to July 22 in violation of Section 8(a)(1) and (5) of the Act. The remaining allegations of the complaint are without merit, and I recommend their dismissal.

FINDINGS OF FACT

I. JURISDICTION

The Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. LABOR ORGANIZATION STATUS

The Respondent admits, and I find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

[1] All dates are in 1997 unless otherwise indicated.

III. ALLEGED UNFAIR LABOR PRACTICES

A. Background

Respondent is engaged in the manufacture of iron castings and commenced operations at the Wauseon facility in or about July 1993. The Union began an organizing effort in December 1995, which culminated in the Union's certification on March 19, 1996, in the following appropriate unit:

> All full-time and regular part-time production and maintenance employees employed by the Respondent at its 620 W. Leggett, Wauseon, Ohio facility, but excluding all managerial employees, technical employees, truck drivers, office clerical employees, and professional employees, guards and supervisors as defined in the Act.

On March 24, a recertification petition was filed, and on April 17, an election was conducted in which a majority of ballots was not cast in favor of recertification. Objections to the election were filed by Respondent on April 24. On June 11, the Board again certified the Union as the collective-bargaining representative of employees. With the exception of the period between March 24 and July 22, it is not in dispute that the parties have met on a regular basis to bargain collectively. There has never been a declaration of impasse, although an agreement has not been reached.

B. Wage Increases

Since July 1993, Respondent has given quarterly automatic raises to those unit employees who work 520 hours in a calendar quarter. These raises continue until the employee reaches the top of the wage scale for his or her job classification. The quarterly raises are not at issue in this proceeding.

In addition to the quarterly raises, Respondent has given two other wage increases to employees, one in the first week of October 1994, and the second in the first week of October 1995. Thomas Bishard has worked for Respondent as a forklift driver since July 1993 and in October 1994, he received a 42-cent-per-hour increase. Bishard testified that there was no announcement by Respondent as to the nature of the raise, but that Kathy Clapfish, a personnel director, told him at the time that it was the annual cost-of-living increase. This conversation took place in the office, and no one else was present. Clapfish is not alleged in the complaint to be a supervisor or agent of Respondent, and she did not testify.

In the first week of October 1995, employees received the other wage increase. Casey Arroyo, an employee, estimated the amount he received to be approximately 3 percent of his wages. Neither Arroyo nor Bishard were informed by any management representative as to the basis for the second raise.

The Respondent introduced two one-page documents relating to the October wage increases. The first document reflects that, an increase of 3.75 percent to base wage rates was approved for all hourly employees effective October 3, 1994. The second document reflects that an increase of 2.75 percent to base wage rates was approved for all hourly employees effective October 9, 1995. Michael McQuinn, Respondent's human resources manager, testified that since he was hired in May 1997, he has been applying the wage rates contained in the October 1995 memo, and that he was otherwise unfamiliar with the circumstances surrounding the October wage increases in 1994 and 1995. At no time was McQuinn ever advised that Respondent had a cost-of-living program or that Respondent grants cost-of-living adjustments on an annual basis. McQuinn is not alleged in the complaint to be a supervisor or agent of Respondent.

The Respondent maintains an employee handbook which does not contain any reference to cost-of-living adjustments.

C. The Britt Facility

Gary Schwert, Respondent's plant superintendent since November 1996 and an admitted supervisor and agent, testified in response to questions by the General Counsel that Kurdziel has another facility in Wauseon called Britt Industries (the Britt facility), and that the Wauseon facility and the Britt facility have a common plant manager. No other evidence was adduced as to the nature of the relationship between the Wauseon facility and the Britt facility.

Steven Wenk, vice president for human resources and an admitted supervisor, testified that the Britt facility began operating 1 or 2 years before the Wauseon facility, and that the same wage increases were given to Britt employees in October 1994 and October 1995 as were given to the employees at the Wauseon facility. However, in October 1996, a 3-percent wage increase was given to employees at the Britt facility, but not to employees at the Wauseon facility. Wenk was not asked to explain the basis of the raises given at either the Wauseon or Britt facilities.

D. 1996–1997 Negotiations

Following the Union's initial certification in March 1996, Bishard joined the union negotiating committee and attended every bargaining session. Bishard testified, and it is not in dispute, that prior to October 1996, the "October raise" was not discussed during negotiations On October 18, 1996, Bishard questioned Respondent's representatives about the failure to give employees what they had come to expect as the October cost-of-living increase. Robert Sikkel, counsel for Respondent herein, told Bishard that employees had never gotten a cost-of-living increase and that cost-of-living increases were breaking companies. Bishard asked if the employees had gotten the raises in October 1994 and October 1995 out of the goodness of the Company's heart, and Wenk responded yes. Wenk was not asked during his testimony whether he ever made this statement.

The failure to give a raise in the first week of October 1996 was discussed several times after October 18, 1996. Arroyo recalled one bargaining session at which he was present when Bishard asked why employees had not received the October 1996 cost-of-living increase, and the Company's response was since the parties were in negotiations, all raises had to be negotiated.

Dan Twiss is the Union's servicing representative and, like Bishard, attended all of the bargaining sessions with Respondent. Twiss acknowledged that at the first bargaining session in early 1996, the Union presented a complete contract proposal which included a proposed cost-of-living increase. Cost of living was not, however, discussed in negotiations until the October 18, 1996 session. Twiss' testimony was corroborative of Arroyo's in that Twiss recalled that each time the cost-of-living increase was discussed, Sikkel's response was that all wage increases had to be negotiated.

Bishard testified that sometime in early 1997, he had a conversation with a supervisor, Larry Jeffries. Bishard asked Jeffries why there had not been a cost-of-living increase in October 1996, and Jeffries said it was because of the Union.

Jeffries is not alleged in the complaint as a supervisor or agent of Respondent, and he did not testify.

E. Allegation of Direct Dealing with Employees

The testimony of Twiss establishes that during the course of negotiations, the parties discussed a 3-percent wage increase, improved health insurance, and a 401(k) plan.

Bishard testified that on April 10, 1 week before the recertification election, he was on the molding floor and he asked Schwert the question that if the Union were voted out, would employees receive a 3-percent raise, better health insurance, and a 401(k) plan. Bishard testified that Schwert started to answer by stating, "in my opinion." Bishard interrupted him and said he did not want Schwert's opinion, he wanted an answer, and Schwert said yes, if the Union were voted out, these increases would be given.

Schwert testified that Bishard approached him and asked him about rumors he had heard of a 3-percent wage increase and an HMO. Bishard asked Schwert if he thought employees would get these benefits if there was no union. Schwert testified that he told Bishard that it was his opinion that if there were no union, employees would get a 3-percent raise and an HMO.

F. Notice Posting Reducing Lunch and Break Periods

It is not in dispute that at all times relevant to this proceeding, unit employees have been allowed a 30-minute lunch period and a 15-minute morning break period. Schwert testified that when he first was employed by Respondent, he had been told by Clapfish that lunch was 20 minutes, but he acknowledged that the lunch break has always been 30 minutes. The employee handbook provides that the morning break period is 15 minutes, but has no provision relating to the lunch period. The length of the lunch and break periods was discussed during negotiating sessions, and it was agreed that they would remain 30 minutes and 15 minutes respectively, consistent with past practice.

On or about April 18, the day after the recertification election, unidentified employees told Bishard that Todd Bingham, a supervisor, had told them that the lunch period was 20 minutes and the morning break period was 10 minutes. Bishard testified that he asked Schwert about Bingham's alleged statement the next day, and Schwert responded that Bingham was just mad about the recertification vote. Schwert did not testify about the substance of this conversation.

Arroyo testified that sometime in April, he saw the following interoffice memo:

> Date: April 22, 1997
> Subject: Lunch Breaks
> From: Management
> To: All Employees
>
> Just a "Reminder Memo" your lunch breaks are 20 minutes.

Arroyo did not say where he saw the memo or how he came to read it. He did not testify that the memo was posted, only that he saw it for the first time in April.

Sometime in June, Schwert observed two employees, Jerry Patterson and Richard Smith, sitting at a break table. One hour later, Schwert returned, and the two were still sitting at the same table. Schwert summoned the two employees into his office together with Arroyo. Schwert told the employees that lunch was 20 minutes and the morning break was 10 minutes. Arroyo took issue with Schwert's description of the breaks, and stated that the breaks were 30 minutes and 15 minutes. Schwert responded that the Company had posted a memo, and he showed them a copy of the April 22 memo.

Bishard testified that sometime in 1997, Bob Robertson, a day-shift supervisor, posted a notice on the lunchroom bulletin board which was addressed to the molding and core setting department employees. The memo, which was not introduced into evidence, was described as stating that the lunch period was 20 minutes and the morning break period was 10 minutes. Bishard asked Robertson about the memo, and pointed out to him that the times were incorrect. According to Bishard, Robertson immediately took out a pen, crossed out the incorrect times, and inserted the correct times of 30 minutes for lunch and 15 minutes for the morning break.

G. Allegation of a Refusal to Meet During the Pendency of the Recertification Petition

The parties stipulated that no bargaining session was held from March 24 to July 22, and a series of letters that was exchanged between the parties regarding the scheduling of bargaining sessions during this period was introduced.

By letter dated March 10, Twiss advised Wenk that the employees had failed to ratify Respondent's contract proposal the day before, and that Twiss was ready to resume negotiations.

By letter dated March 13, Wenk advised Twiss that the unratified contract proposal which had been sent to the Union on February 21 was a final proposal. Wenk stated that Respondent was willing to meet to answer any comments or concerns about the final proposal or to discuss any changes in the Union's proposal. He then added, "However, if such a meeting is to take place, we believe a mediator must be involved." Wenk then indicated that Respondent was available to meet on April 17.

Both sides contacted Federal Mediator Rick Terpainski, and a bargaining session was scheduled for April 17. Twiss subsequently developed a scheduling conflict and the session was canceled. The next date that Terpainski was available was July 22.

By letter dated April 21, Twiss advised Wenk that he was ready to resume contract talks.

By letter dated April 23, Wenk advised Twiss that he believed that improper tactics were used by union supporters which influenced the result of the recertification election, and that Respondent intended to file "an appeal" with the Board. He then added, "It may be prudent to find out what the NLRB rules on improper election tactics by UAW supporters prior to meeting. We will await your correspondence outlining your thoughts on a next meeting date."

By letter dated May 5, Twiss advised Wenk that regardless of Respondent's objections to the conduct of the recertification election, the Union was still the bargaining agent for employees and was ready to resume negotiations as soon as possible. Twiss requested that Wenk call him to set up dates.

By letter dated May 12, Wenk reminded Twiss that Respondent was willing to meet but that "the involvement of a mediator was necessary." He pointed out that a meeting had been set up by Mediator Rick Terpainski which was later canceled at Twiss' request. Wenk wrote, "If you now wish to meet for the above purpose, please have Mr. Terpainski coordinate the meeting date, time, and location."

By letter dated May 21, Twiss advised Wenk that Wenk's suggestion that a Federal mediator participate in negotiations was acceptable to the Union, but that any meeting must be

"without the imposition of preconditions." Again, Twiss asked that Wenk contact him to arrange a date for the meeting.

By letter dated May 23, Wenk advised Twiss that Respondent continued to be willing to meet, and reminded Twiss that it was the Union that had canceled the April meeting. He then wrote, "We suggest that mediator Rick Terpainski schedule mutually acceptable meeting locations and times."

IV. ANALYSIS

A. The Failure to Give the October 1996 Raise

When an employer, by promise or by course of conduct, has made a particular benefit part of the established wage or compensation system, he is not at liberty unilaterally to change this benefit either for better or worse during the period of collective bargaining. *Daily News of Los Angeles,* 315 NLRB 1236, 1237–1238 (1994), enfd. 73 F.3d 406 (D.C. Cir. 1996). The issue presented here is whether the increases given in October 1994 and October 1995 became part of the established structure of compensation for Respondent's employees, such that the admitted failure to give a similar raise in October 1996 without first bargaining with the Union constituted an unlawful unilateral change in a condition of employment. I find that the evidence is insufficient to establish a violation.

The first of General Counsel's theories, and the theory that is alleged in the complaint, is that the Respondent had an established practice of granting cost-of-living increases. The sole evidence adduced was the testimony of Bishard, which I credit, that in 1994, Clapfish told him that the October raise was an annual cost-of-living increase. While the General Counsel argues that this statement is binding on Respondent, he failed to establish any legal basis for that liability. Clapfish was not alleged in the complaint either as a supervisor or as an agent of Respondent within the meaning of the Act. Nor did General Counsel move to amend the complaint during the hearing or in his posthearing brief. This failure cannot, in my opinion, be dismissed as mere oversight, as Clapfish's status vis-a-vis Respondent is critical to the General Counsel's case. In the absence of the issue being properly joined by complaint and answer, there is no basis to conclude that Clapfish was a supervisor or agent of Respondent. *Likra, Inc.,* 321 NLRB 134 (1996); *Q-1 Motor Express, Inc.,* 308 NLRB 1267, 1268 (1992), enfd. 25 F.3d 473 (7th Cir. 1994), cert. denied 513 U.S. 1080 (1995).

Nor can it be said that the issue of Clapfish's supervisory or agency status was fully litigated at the hearing. The sum total of evidence regarding Clapfish was Bishard's description of her as a personal director who hired employees, and Schwert's reference to her as the person who had misinformed him about the length of the employee lunch period. I do not believe that these limited references constitute a sufficient record upon which to make a determination of supervisory or agency status. While Bishard may have perceived Clapfish as the person who hired employees, his perception may not have been accurate. Clapfish may have been acting at the direction of a superior when she participated in the hiring process, and may not have been exercising independent judgment. Nor is there any evidence that when she spoke with Bishard, alone, about the cost-of-living increase that she had either actual or apparent authority to make this representation on Respondent's behalf. The record is simply silent as to these facts, and in the absence of such evidence, any conclusion regarding Clapfish's status would be speculation.

Finally, the General Counsel did not adduce any evidence other than Clapfish's observation to establish that the October raises were based upon cost-of-living considerations. The Respondent flatly denied during the October 18, 1996 bargaining session that it had ever given cost-of-living increases. The memoranda setting forth the wage increases did not mention either the term "annual" or "cost of living." John Allemier, the plant superintendent who authored the memoranda, was not called to testify, and Schwert and Wenk who did testify were not asked about the memoranda. Finally, McQuinn testified that he was not aware that Respondent ever granted cost-of-living adjustments on an annual basis.

Based on the foregoing, I find that the General Counsel has failed to prove the complaint allegation that Respondent unlawfully failed to grant employees a customary cost-of-living increase.

The second of General Counsel's theories which is not alleged in the complaint but which is alluded to by the evidence, is that the increases given to Respondent's employees at the Wauseon facility were pegged to the increases given at the Britt facility, and that the Britt facility raises therefore became part of the established wage structure for Respondent's employees. Once again, there is no evidence that the raises given at the Britt facility were the criteria for the Wauseon facility raises, other than the fact that for 2 years, employees at both facilities received the same across-the-board increase. It is the burden of the General Counsel to establish by a preponderance of the evidence that these increases constituted a pattern and practice by Respondent, and was not a mere coincidence between loosely affiliated companies. I find the General Counsel has failed to meet that burden.

In *Dynatron/Bondo Corp.,* 323 NLRB 1263 (1997), the Board considered five factors in determining whether an employer had an established pattern or practice of granting wage increases: (1) the criteria for granting the wage increase; (2) the timing of the increase; (3) the amount of the increase; (4) which employees received the increase; and (5) whether the increase had been granted over a significant period of time. The most critical flaw in the General Counsel's case here is that the first *Dynatron* factor, the criteria for granting the 1994 and 1995 wage increases, was not established. The increases given by Respondent may have been based upon cost-of-living indices, market data, performance or production standards, or any other set of fixed or discretionary factors. It may well be that in October 1996, Respondent applied the same criteria that it applied in 1994 and 1995, and determined that no wage increase was owing. Under such circumstances, there would be no violation of the Act. See *American Packaging Corp.,* 311 NLRB 482 (1993). In the absence of knowing what the criteria was for granting the wage increases in 1994 and 1995, it is impossible to conclude that the Respondent failed to apply that criteria in withholding the increase in 1996. I also note that although the increases were given at the same time in 2 successive years, the amounts of the increase were not equal.

Under all of these circumstances, I find that the evidence is insufficient to establish that the 1994 and 1995 wage increases became part of Respondent employees' established wage structure and a term and condition of their employment. Respondent's failure to give a similar increase in October 1996 without first giving notice to the Union and an opportunity to bargain did not therefore, violate Section 8(a)(1) and (5) of the Act and I recommend dismissal of that portion of the complaint.

I also recommend dismissal of that portion of the complaint alleging that the failure to give the October 1996 increase violated Section 8(a)(3) of the Act. First, for the reasons already stated, there is insufficient evidence to conclude that the failure to give a raise constituted a change in past practice. Second, even if there had been a departure from past practice, the only evidence to establish union animus as the motive for the change was the statement attributed to Jeffries, months after the fact, that the reason the cost-of-living increase had not been given was because of the Union. Once again, Jeffries was not alleged in the complaint as a supervisor or agent of the Respondent, and no evidence was adduced to establish his status as such other than Bishard's conclusory characterization of Jeffries as a "supervisor." I find there is insufficient evidence to establish a violation of Section 8(a)(3) of the Act.

B. Allegation of Direct Dealing with Employees

The General Counsel alleges that the conversation between Bishard and Schwert on April 10 constituted direct dealing by Respondent with an employee in violation of Section 8(a)(5). The General Counsel cites no case in support of that proposition.

It is not in dispute that it was Bishard, not Schwert, who initiated the April 10 conversation. Bishard was a member of the negotiating committee at the time of the conversation, and solicited Schwert's opinion about the impact the pending recertification election might have on future negotiations. General Counsel cites no case, and I have found none, which supports the proposition that when a member of a union negotiating committee asks a question of a member of management's negotiating committee away from the bargaining table, that the manager's response to the question constitutes direct dealing. There was no attempt by Respondent to negotiate with Schwert individually, nor was any action taken by Respondent as a result of the conversation. I therefore recommend dismissal of this portion of the complaint.

C. Duration of the Break and Lunch Periods

The complaint alleges that on or about April 18 or 19, Respondent posted a notice to employees which reduced the lunch period from 30 to 20 minutes, and reduced the morning break from 15 to 10 minutes, without prior notice to the Union and without affording the Union an opportunity to bargain about the change. Witnesses for both sides agreed that Respondent never actually implemented a change with respect to the length of time given employees for lunch or for their morning break. There is credible evidence, however, that Respondent threatened employees with a reduction in their lunch and break periods

Bishard credibly testified that on April 19, the day after the recertification election, he asked Schwert about a statement attributed to Todd Bingham that that the lunch and break periods were being reduced. Schwert responded that Bingham was just mad about the recertification vote. Once again, I find the General Counsel's failure to allege Bingham as a supervisor or agent of Respondent in the complaint significant. If Bingham were a statutory supervisor or agent, Schwert may have had an obligation to disavow his statement. *Passavant Memorial Area Hospital,* 237 NLRB 138 (1978). In the absence of any evidence of such status, however, Schwert may correctly have perceived himself not to be under any obligation to disavow the sentiments of a disgruntled employee. I therefore decline to find a violation based on this conversation.

I similarly decline to find a violation on the basis of Bishard's testimony that sometime in 1997, Bob Robertson, yet another person not alleged as a statutory agent or supervisor**,** posted a notice in the employee lunchroom stating that the break and lunch periods were reduced. Bishard credibly testified that when he pointed out the error to Robertson, Robertson immediately corrected the notice. Assuming this was a notice posted by Respondent, there is no evidence that any employee saw the incorrect notice other than Bishard, and the notice was immediately corrected in his presence. Any violation of the Act was therefore de minimis*,* and I decline to find a violation based upon the posting of this notice.

I do find that the April 22 memo, which Arroyo saw in April, and which Schwert displayed to Arroyo, Patterson, and Smith in June did constitute a threat of a unilateral change in the lunch break. Further, Schwert's statement to the employees in the June meeting that lunch was 20 minutes and the morning break was 10 minutes also constituted a threat of a unilateral change in these working conditions in violation of Section 8(a)(1) and (5) of the Act. *Page Litho, Inc.,* 311 NLRB 881 (1993), enfd. in relevant part 65 F.3d 169 (6th Cir. 1995); *Goren Printing* Co., 280 NLRB 1120 (1986).

D. Respondent's Refusal to Meet and Bargain

The General Counsel contends that Respondent unlawfully refused to meet and bargain with the Union during the period March 24 to July 22 by conditioning any meeting between the parties on the presence of a Federal mediator. Respondent defends its actions, memorialized in the correspondence introduced, as simply a case in which both parties sought to involve a neutral third party to facilitate the process, but were unable to find a mutually agreeable date. I find merit to the General Counsel's argument.

In each of the letters authored by Twiss, he was unequivocal in the Union's willingness to meet and bargain at any time convenient to the parties to the negotiations, to wit, the Union and the Respondent. The first letter sent by Twiss was on March 10, and 3 days later Wenk responded by stating that a mediator *must* be involved. Wenk indicated a willingness to meet on April 17, the only date during the time period in issue that the Federal mediator was available. Twiss was amenable to the participation of a Federal mediator, and agreed to meet on April 17. However, due to a personal scheduling conflict, Twiss had to cancel the meeting. The next meeting which the mediator could fit into his schedule was July 22, and Respondent relied on the mediator's unavailability as an excuse not to meet and bargain with the Union until that date. Wenk specifically stated in the May 12 letter that "the involvement of a mediator was necessary." He reiterated this position in his letter of May 23 when he suggested that the mediator, not Twiss, schedule bargaining sessions.

The timing of Respondent's delaying tactics is not coincidental. The recertification petition was filed on March 24, precisely the period of time when Respondent preconditioned meeting with the Union on the presence of a Federal mediator. Negotiations resumed after the election was over and the Union was again certified.

I find the Respondent's insistence on the presence of a mediator at bargaining sessions constituted a refusal to meet and bargain in fact, from March 24 to July 22, and violated Section 8(a)(1) and (5) of the Act. *Riverside Cement Co.,* 305 NLRB 815, 818–819 (1991).

CONCLUSIONS OF LAW

1. The Respondent is engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and has engaged in unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The following unit is appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All full-time and regular part-time production and maintenance employees employed by the Respondent at its 620 W. Leggett, Wauseon, Ohio facility, but excluding all managerial employees, technical employees, truck drivers, office clerical employees, and professional employees, guards and supervisors as defined in the, Act.

4. The Respondent violated Section 8(a)(1) and (5) of the Act on or about April 22, 1997, and in June 1997, by threatening, both orally and in writing, to unilaterally reduce employees' lunch and morning break periods without first notifying the Union or giving the Union an opportunity to bargain about such changes.

5. The Respondent violated Section 8(a)(1) and (5) of the Act from March 24 to July 22, 1997, by insisting on the presence of a mediator as a precondition to meeting and bargaining with the Union.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

Having found that Respondent threatened employees, both orally and in writing, to unilaterally reduce the lunch and morning break periods, it shall cease and desist from any such further threats.

Affirmatively, Respondent must rescind, in writing, any and all memoranda, including but not limited to the April 22, 1997 interoffice memo, which state, in substance, that employees' lunch period is less than 30 minutes or that employees' morning break period is less than 15 minutes. A copy of the recision, signed by an authorized representative of Respondent, shall be mailed to the Union. Respondent must also meet and bargain, on request, with the Union in a timely manner without regard to the participation or presence of a mediator at any bargaining session.

[Recommended Order omitted from publication.]